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No. 85-1924

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 340,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

KATHRYN A. SURE
MARK S. RENNER
101 Park Center Plaza,
Suite 1001
San Jose, California 95115

LAURENCE J. COHEN
1125 15th Street, N.W.
Washington, D.C. 20005

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

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The citations to the decisions below, the basis of this Court's jurisdiction, the relevant statutory provisions and a statement of the case are set at pp. 1-5 of the petition for a writ of certiorari filed by the National Labor Relations Board ("NLRB" or "the Board") and are therefore not repeated here.

REASONS FOR DENYING THE WRIT

Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B) ("NLRA" or "the Act"), makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The question posed here is whether that section reaches union conduct that is not

intended to and cannot affect the integrity of the collective-bargaining process but that may have the incidental effect of denying non-union employers the services of union members as supervisors. The court below held that § 8(b)(1)(B) does not stretch that far. Nothing in the Board's petition justifies further review of that eminently sound holding.

In point one we show that the situation presented here is qualitatively different than the class of situations Congress intended to regulate in enacting § 8(b)(1)(B), and that the Board's petition provides no support in the legislative materials for broadening that section beyond its stated purpose. In point two we demonstrate that the NLRB is wrong in claiming that the decision below is inconsistent with the decisions of this Court and that the NLRB's claim of a conflict among the circuits was refuted by the Board itself just three years ago in the course of successfully opposing a petition for a writ of certiorari in *IBEW Local 323 v. NLRB*, 464 U.S. 950 (1983).

1. As the Board acknowledges in its petition, § 8(b)(1)(B) "was intended to prohibit unions from dictating '"who shall represent an employer in the settlement of employee grievances'" or compelling '"the removal of a . . . supervisor who has been delegated the function of settling grievances."'" NLRB Pet. at 7 n. 5, *quoting Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790, 798 (1974), *quoting* S. Rep. 105, 80th Cong. 1st Sess. 21 (1947). That being so, it is common ground in this case that a union which is engaged with an employer in the collective bargaining process violates § 8(b)(1)(B) by exerting coercive pressure on the employer with respect to the employer's choice of his bargaining representatives.

In *NLRB v. Electrical Workers Local 73 (Chewelah Construction Co.)*, 621 F.2d 1035 (9th Cir. 1980), the Ninth Circuit by a parity of reasoning recognized that

the concerns underlying § 8(b)(1)(B)—concerns relating to the integrity of the collective-bargaining process—are implicated only "when the union charged with influencing an employer's choice of bargaining representatives is the bargaining representative of that employer's employees." *Id.* at 1036. Concluding that § 8(b)(1)(B) was not intended to extend further and interdict legitimate union action that is "not inherently destructive of an employer's right to choose a loyal bargaining representative," such as enforcement of a union rule designed to minimize wage competition by requiring union members to work only for unionized employers, the Ninth Circuit in *Chewelah* held that § 8(b)(1)(B) should not be read to proscribe union enforcement of rules against supervisor-members if the supervisor works for an employer whose employees "the union neither represents nor shows an intent to represent." *Id.* at 1037.

In the instant case, the NLRB held that the respondent union violated § 8(b)(1)(B) by fining several members for working for non-union employers even though a year before the fines were imposed respondent had disclaimed any interest in representing the employees of those employers and in the ensuing year respondent had made no attempt to represent those employees. To the Board it was sufficient to find a § 8(b)(1)(B) violation that the union discipline could make it more difficult for the non-union employers to recruit union members to serve in a supervisory/grievance-adjusting capacity. *See* Pet. App. 9a-37a. The court below denied enforcement of the NLRB's decision, however, concluding that its prior decision in *Chewelah* was "control[ling]" and "dispositive of the issue in this case." Pet. App. 6a.

The Board points to nothing in the legislative materials to suggest that § 8(b)(1)(B) was intended to have the sweeping effect that the Board's decision in this case affords to that section. Nor does the Board dispute in any way the Ninth Circuit's conclusion that the evils

against which § 8(b)(1)(B) was avowedly aimed are far removed from the type of conduct *Chewelah* upholds, *viz.*, union enforcement of a rule against working for non-union employers. And given the "strong labor policy favoring the association of employees to eliminate competition over wages and working conditions," *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622 (1975), the Board fails to posit a theory which would justify imputing to Congress the unexpressed intent to achieve the results the Board attributes to § 8(b)(1)(B)—results that run directly contrary to that "strong labor policy" by precluding enforcement of a union rule that prohibits union members from aiding and abetting the efforts of non-union employers to undermine union standards.

2. The Board advances two principal arguments in support of its petition for a writ of certiorari. First the Board claims that the decision below "is inconsistent with . . . this Court's decision" in *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411 (1978) ("ABC"). *See* NLRB Pet. at 6. And second the Board contends that the decision below "is in direct conflict with the decision of the Eleventh Circuit in *NLRB v. IBEW, Local Union No. 323*, 703 F.2d 501, *cert. denied*, 464 U.S. 950 (1983)." NLRB Pet. at 6.

(a) Contrary to the Board's assertion there is no conflict between *ABC* and the decision below; indeed the issue posed here is entirely separate from the question decided in *ABC*.

As the Court stated at the very outset of its opinion in *ABC*, "[T]he issue in th[e *ABC*] litigation [w]as whether a labor union commits an unfair labor practice when it disciplines a member who is a supervisory employee for crossing the union's picket line during a strike [against an employer whose employees the union represents] and performing his regular supervisory duties, which include the adjustment of grievances." 437 U.S. at 413. That issue arose because in *Florida Power &*

Light v. Electrical Workers, supra, the Court had held that a union acting as a collective bargaining representative may discipline a supervisor-member who crosses a picket line to perform *rank-and-file* work for the employer. The lower court in *ABC* read *Florida Power & Light* to apply as well to such a union's discipline of a supervisor who crosses a picket line to perform *purely supervisory work* for the employer.

Given the nature of the controversy in *ABC*, the Court in that case devoted its opinion to exploring the limits of *Florida Power & Light* and to explaining why the lower court had misinterpreted that decision. The *ABC* Court had no occasion to address the entirely separate issue posed in the instant case: whether § 8(b)(1)(B) reaches union conduct that *cannot affect the integrity of the bargaining process* because the conduct, at most, affects employers with whom the union has no present or prospective bargaining relationship.

The NLRB bases its claim that the decision below conflicts with *ABC* on language in the final footnote in the *ABC* opinion. There the Court disposed of the contention of the union in that case, which represented writers, that its discipline of director-supervisors was permissible because the director-supervisors did not "deal[] with writers or adjust[] their grievances." 437 U.S. at 437 n. 37. The Court rejected that argument because "[a] union may no more interfere with the employer's choice of a grievance representative *with respect to employees represented by other unions* than with respect to those employees whom it itself represents." *Id.* (emphasis added).

The NLRB seeks to extract from this sentence the conclusion that the existence *vel non* of a bargaining relationship is irrelevant under § 8(b)(1)(B). But as the emphasized portion of the quoted language shows, the ABC footnote faithfully carries out Congress' purpose in assuring that the employer will be represented by his agent and not by a union agent in collective bargaining

and grievance-arbitration. The *ABC* footnote does not speak to the situation presented here in which the union does not represent *any* employees of the employers for whom the disciplined supervisor-member works and in which the union's discipline therefore does not threaten to undermine any collective bargaining relationship.

In short, the issue decided below is not answered by *ABC*. Thus the NLRB is wrong in contending that the decision below is inconsistent with *ABC*.

(b) The alternative ground the Board offers in support of its petition is that the decision below "is in direct conflict," Pet. at 6, with the Eleventh Circuit's decision in *NLRB v. IBEW Local 323*, *supra*. The Board argues that *Chewelah* conflicts with the Eleventh Circuit's decision in *Local 323*, and that because the Ninth Circuit in the instant case adhered to *Chewelah* this "conflict between the Circuits . . . continues to persist." Pet. at 11.

When the union in the *Local 323* case sought review in this Court of the Eleventh Circuit's decision just three years ago, the Board had no difficulty in reconciling the views of the Ninth and Eleventh Circuit. Opposing the union's petition for certiorari in *Local 323* the Board argued as follows:

> There is no merit to petitioner's contention that the court of appeals' decision here conflicts with the Ninth Circuit's decision in *Chewelah*. The Ninth Circuit in *Chewelah* found that the disciplining union lacked a representation interest in the employer's employees and therefore held that its discipline of the employer's supervisor for working nonunion did not violate Section 8(b)(1)(B). Here, by contrast, as the court of appeals observed, the record suggests that petitioner 'may indeed have had an interest in representing [the employer's] employees;' there was evidence that [the union] daily approached electrical employees and asked them to sign its working agreement, that the [union] had requested recognition from [the supervisor's employer], and that, just before

> [the union] filed its second set of charges against [the supervisor], he had refused [the union's] business manager's request that [the supervisor] sign [the union's] working agreement. [NLRB Br. in Opp. in No. 83-63 at 6-7 n.4] [1]

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[1] In its petition in the instant case, the NLRB claims (at 11 n.9) that one of the grounds on which the Agency opposed certiorari in *Local 323* was that "the conflict with *Chewelah* was not clear because the Ninth Circuit in *Chewelah* had not precisely delineated its requirement of a representation interest." The Board goes on to argue that "[a]ny uncertainty about the Ninth Circuit's standard has been dispelled by its opinion in this case and thus it is now clear that the Ninth and Eleventh Circuits have adopted irreconcilable standards." *Id.*

In truth, however, the *only* argument the Board in *Local 323* offered to defeat the petitioner's claim of a circuit conflict was the assertion that the Eleventh Circuit's decision was consistent with the Ninth Circuit's requirement of a "representation interest"; the Board's brief in *Local 323* did not doubt the existence or meaning of such a requirement in the Ninth Circuit. This is clear from the quotation in text from that brief which represents the full discussion in the brief of the circuit-conflict issue.

Nor is there any merit in the Board's suggestion that the decision below somehow adds clarity to *Chewelah* and has resulted in a conflict that did not previously exist. *Chewelah* could not have been clearer in holding that "[a] union does not violate Section 8(b)(1)(B) by disciplining a member, even though that member is also the bargaining representative of an employer, if the union neither represents nor shows an intent to represent the employer's employees." 621 F.2d at 1037. The Board's decision in the instant case recognizes this and expressly disagrees with *Chewelah*. And the appellate court's decision denying enforcement to the Board's order merely reaffirms *Chewelah* and applies it to the facts of this case. Indeed, the court below stated its holding here in the narrowest of terms:

> We hold that where a Union has filed a disclaimer of interest [of representing the employees of the disciplined supervisor] and has made no subsequent organizing efforts, its discipline of members fully a year after the termination of the bargaining relationship between the Union and the employers cannot reasonably be construed as an effort to restrain or coerce the employer. [Pet. App. 7a]

In light of the NLRB's opposition in *Local 323*, this Court decided not to issue a writ of certiorari to review the Eleventh Circuit's decision. 464 U.S. 950. Nothing that has happened in the ensuing three years justifies a different course in this case.[2]

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[2] The Board claims that the decision below "conflicts in principle" with rulings by three other circuits which, according to the Board, "demonstrate that the gravamen of a § 8(b)(1)(B) violation is the deprivation of an employer's representative, whether or not the union has a specific representational interest." Pet. at 10-11 n.8. The cases the Board cites all pre-date *Local 323*, yet the Board did not find the supposed "conflict in principle" between these cases and the Ninth Circuit sufficient to warrant this Court's attention at that time.

Moreover, the cases on which the Board relies do not address the "principle" on which the decision below rests, *viz.*, that union coercion that does not affect a present or prospective collective bargaining relationship does not violate § 8(b)(1)(B). In *NLRB v. New Mexico District Council of Carpenters (A. S. Horner)*, 454 F.2d 1116 (10th Cir. 1972), the union disciplned a supervisor who worked for a non-union company less than a month after the union had lost a representation election at that company. And in *International Organization of Masters v. NLRB*, 539 F.2d 554 (5th Cir. 1976), *cert. denied*, 434 U.S. 828, and *International Organization of Masters v. NLRB*, 485 F.2d 1271 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 956, the courts concluded that union attempts to coerce an employer into hiring union members as supervisors where the union also represented some of the employer's employees are unlawful even if the union's aim is to further the well-being of its supervisor-members (by securing jobs for them) and not to affect the manner in which the supervisors perform their supervisory duties.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KATHRYN A. SURE
MARK S. RENNER
101 Park Center Plaza,
Suite 1001
San Jose, California 95115

LAURENCE J. COHEN
1125 15th Street, N.W.
Washington, D.C. 20005

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390